UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

M & M AFFORDABLE PLUMBING, INC.	)	
	)	
and	)	Case 13-CA-121459
	)	
JEFFREY CEREN, an Individual.	)	

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Joshua M. Feagans
Patrick M. Griffin
Griffin | Williams LLP
501 W. State Street, Suite 203
Geneva, IL 60134
(630) 524-2563

Counsel for M & M Affordable Plumbing, Inc.

Dated: December 17, 2014

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

M & M AFFORDABLE PLUMBING, INC.	)	
	)	
and	)	Case 13-CA-121459
	)	
JEFFREY CEREN, an Individual.	)	

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Respondent, M & M AFFORDABLE PLUMBING, INC. ("MM"), submits this brief in support of its exceptions to the Decision and Order of Administrative Law Judge Melissa M. Olivero:[1]

Introduction

In 2013, Jeffrey Ceren lodged two failed charges against his own Union and MM with the Labor Board which took issue with the Union's refusal to allow his withdrawal ***to become*** employed as a ***manager*** and estimator with MM. Desperate for money, Jeffrey Ceren sought yet another bite at the apple on January 29, 2014, when he filed yet another charge against MM which materially contradicted his prior charges and sworn statements by alleging actual ***employment*** with MM as an ***estimator***, not a manager. Surprisingly, this demonstrably perjurous third charge gave rise to a Complaint issued by the General Counsel on March 28, 2014 despite the obvious material inconsistencies with Mr. Ceren's prior charges and sworn statements. The General Counsel, relying solely on the testimony of an admitted and known liar, pressed the fabricated claims against MM at

[1] Throughout these exceptions and Respondent's supporting brief, citations to the records shall be as follows: the ALJ's decision shall be "JD [Page]:[Line]"; the hearing transcript shall be "Tr. [Page]"; the General Counsel's exhibits shall be "GCX [Number]"; and Respondent's exhibits shall be "RX [Number]."

hearing, alleging violations of the National Labor Relations Act (the "Act") in: (1) discharging Mr. Ceren on September 24, 2013 for his inability to withdraw from the Union; and (2) threatening not to rehire Mr. Ceren in October of 2013 because of Mr. Ceren's complaints to the Union.

Despite testimony that was replete with contradictions, admitted lies and perjury, and an express admission by Mr. Ceren himself that he "would testify to anything...to make money," the ALJ excused away Mr. Ceren's lies and, for the most part, accepted wholesale Mr. Ceren's direct examination testimony even though it was entirely discredited and contradicted on cross examination. (Tr. 241-242). In doing so, the ALJ also improperly disregarded more than 70 years of the Board's own case law. For even if Mr. Ceren's claim of employment as an estimator were true, he would still be a managerial employee and fall short of the protections afforded by the Act. See *Aeronica, Inc.*, 221 N.L.R.B. 69 (1975) and *General Dynamics Corporation*, 213 NLRB 851 (1974).

The ALJ also failed to recognize, or similarly disregarded, the import of several other admissions made by Mr. Ceren on cross examination. Perhaps the most important admission that was ignored was Mr. Ceren's concession, under oath, during cross examination that MM had offered him employment as a management estimator conditioned ***only*** upon the Union's approval. (Tr. 185, 220-221). As Mr. Ceren acknowledged, and the collective-bargaining agreements spelled out, such a position was not within the Union's occupational jurisdiction. (Tr. 192, 199-200). Thus, Mr. Ceren's compliance with this agreement should not have been a problem except for the manner in which Mr. Ceren ***chose*** to seek approval – a withdrawal. (Tr. 185). Mr. Ceren sent letter after letter to the Union detailing the proposed job and its duties and requesting withdrawal, not mere approval. When the withdrawal was ultimately denied, it became clear that the Union would not approve Mr. Ceren's non-jurisdictional work as a manager/estimator. (GCX 14). MM and Mr. Ceren's very brief

association ended as a result. An association that the ALJ concludes, in hindsight, was employment, but was treated much differently by MM and Mr. Ceren at the time.

The repeated and incontrovertible admissions clearly establish that not only was Mr. Ceren never an "employee" entitled to the protections of the Act, but that he was never fired from employment with MM, let alone fired to avoid payment of union wages and benefits. Further, his employment was never conditioned upon withdrawal from the union. Thus, MM did not violate the Act.

Argument

A. Regardless Of Whether Jeffrey Ceren Was A Manager, Manager/Estimator Or Just An Estimator, The Position Was Managerial And Excluded From The Act.

With very little analysis, the ALJ concluded that Mr. Ceren was not a "managerial employee" and was thus entitled to the protections of the Act. The only logic the ALJ cites for this conclusion is her belief that Mr. Ceren's description of the managerial nature of his position to the Union and, later, to the NLRB in charges and sworn statements were, essentially, lies. (JD 12:4-16). In countenancing Mr. Ceren's proclivity for perjury, the ALJ ignores Mr. Ceren's admissions on cross-examination and existing precedent relative to estimating positions.

i. Estimating is a managerial position under the Act.

It is well established that managerial employees are not afforded the protections of the Act. *N.L.R.B. v. Bell Aerospace*, 416 U.S. 267, 94 S.Ct. 1757 (1974). Managerial employees have been consistently defined as those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer." *Id.* at 289. In *Aeronica, Inc.*, estimators were deemed managerial employees because they were "instrumental in setting prices and assist in

negotiating contracts with customers." *Aeronica, Inc.*, 221 N.L.R.B. 69 (1975); See also *Enclosure Corporation*, 225 NLRB 82 (1976)(employee involved in negotiating contracts with customers was managerial employee). Likewise, in *General Dynamics*, estimators who were privy to pricing and profit information were deemed managerial employees even though they utilized pricing books and customer contracts were negotiated and signed by a "contracts man." *General Dynamics Corporation*, 213 NLRB 851 (1974). Similarly, in *Bulldog Electric*, estimators were found to be managerial employees where they had the ability to commit the Employer financially to third persons. *Bulldog Electric Products Co.*, 96 NLRB 85 (1951). Finally, in *Pullman Standard*, estimators who were privy to the precise labor rates of the employer were deemed to be managerial employees. *Pullman Standard*, 214 NLRB 100 (1974).

Mr. Ceren's undeniable involvement as an estimator in pricing, customer negotiation and profits, as well as his knowledge as to MM's labor rate, (Tr. 118), places him squarely within existing precedent which recognizes estimators as managerial employees. See *Aeronica, Inc.*, 221 N.L.R.B. 69 (1975); *General Dynamics Corporation*, 213 NLRB 851 (1974) and *Pullman Standard*, 214 NLRB 100 (1974).

On cross examination, Mr. Ceren admitted to his involvement in setting prices as well as his intimate knowledge about MM's expected profits. (Tr. 215-216). Specifically, Mr. Ceren testified at the hearing as follows:

Q. As part of your position as an estimator, you would set prices, correct?

A. I would set prices based on what was given to me, yes.

Q. And you had intimate knowledge about the profit that was requested by M & M Affordable Plumbing in their bids and proposals, correct?

A. I was given an hourly rate and discounts and that was our - - that was what his selling price was.

Q. And that would include the profit, correct?

A. Yes. (Tr. 215-216).

While Mr. Ceren refused to directly acknowledge his role in negotiating customer contracts, he conceded that the position involved "going out and meeting new contractors" and pricing "change orders out." (Tr. 208, 216). Further, Mr. Ceren conceded that his position involved "creating the bid sheet and looking at pricing" as well as setting the "proposal price." (Tr. 201). Mr. Ceren was clearly involved in negotiating and setting customer prices.

Thus, if the ALJ applied existing precedent to Mr. Ceren's self-described estimator position, the undeniably conclusion should have been that Mr. Ceren was a managerial employee.

ii. Mr. Ceren admitted to a job description as contained in letters to the Union which undeniably describes the duties of a managerial employee.

While the ALJ rejected Mr. Ceren's prior statements in letters, charges and sworn statements concerning the managerial nature of his position at MM as lies, she failed to give effect to his repeated admissions on cross examination to the contrary. In fact, Mr. Ceren repeatedly testified at the hearing as to the veracity of his various statements and, particularly, his letters to the Union.

Specifically, Mr. Ceren testified as to the veracity of his letters as follows:

Q. You were truthful in your dealings with the union?

A. Yes, sir.

Q. You were truthful in the letters you wrote to the union?

A. I was truthful, yes. (Tr. 173)

* * *

Q. Were your letters to the union lies?

A. No, the letters to the union were not lies. (Tr. 189)

* * *

Q. Referring you back to your September 10, 2013, letter, GC 13. In that third and that fourth and that fifth paragraph, it lists a number of duties. Can we agree that all of those duties, in your mind, were non-jurisdictional work?

A. I'm sorry, sir, you are back to what letter, GC 13?

Q. GC 13, your September 10, 2013, letter.

A. Okay.

Q. I refer you again to the third paragraph, the fourth paragraph and the fifth paragraph. And isn't it true that in your mind, and based upon your statements in this letter, all the work you have listed here, as to the proposed duties of your position, were non-jurisdictional work?

A. Correct.

Q. Okay. And in fact, the bottom of that first page, you state in the last sentence on that first page: "However, at no time will I be, quote unquote, working with the tools, performing jurisdictional plumbing work." Is that true?

A. Correct.

Q. It was true when you wrote it?

A. That's what is says, yeah.

Q. That was true when you wrote it?

A. Yes.

Q. Its true today, correct?

A. This is what was written to the union for the - - against the collective bargaining agreements, yes.

Q. All I'm asking you, was it true when you wrote it.

A. Yes. Yes.

Q. And it's true today. Yes?

A. Yes. (Tr. 204-206)

* * *

Q. It goes on to say: "Therefore, to close this letter, I will restate that what I said in my first letter: I am seeking withdrawal from the union membership to take on this new management position." Is that true when you wrote it?

A. Yes, sir.

Q. True today.

A. It's true. (Tr. 207)

The September 10, 2013 letter, (GCX 13), is of particular importance given Mr. Ceren's extensive summary of his duties contained therein. Given Mr. Ceren's repeated statements as to the veracity of this letter in particular, it is entirely improper for the ALJ to discount the letter as a lie. Further, a plain reading of Mr. Ceren's proposed job duties as contained in the September 10, 2013 letter reveals his job was much more than a mere estimator. Specifically, Mr. Ceren summarized his extensive duties as follows:

Estimating; purchasing; selling; office management; project management; and

material management. In further depth; picking up blue prints; sending prints and material list out for quotes; reviewing quotes and prints; meeting with architects, engineers, suppliers, manufacture reps builders and home owners. Other duties: pricing change orders, typing (inputting on computer) proposal and change orders; reviewing contracts and change orders; and making job notes and material list for jobs with description of work to be completed. I also be expected to be meeting with the home owners either in the office or at a plumbing showroom to help with selections of plumbing products for their home. I will be going to plumbing product shows, home builder's shows and education seminars to stay informed about the industry again.

In addition, another task assigned to me will be putting together a purchasing system in the office to help control our inventory. I will be managing the material to help reduce lost product, cost of product and damaged product. I will schedule job site orders and take job site material orders from the field. I will be taking service calls over the phone and helping (advising) customers on their service needs.

Furthermore: I will prepare billings for contract jobs and service jobs. I will be reviewing insurance needs for builders. I will be reviewing job costing to help with my estimating to keep bids in line. I will review and meet with plumbing inspectors to meet their requirements and needs. Finally, I will be performing general office tasks, ranging from answering the phone, distributing faxes, adding paper to the copier, and other such normal activities. The job that has been offered to me due to my past experience of owning and running a plumbing company. That will be beneficial for the office as I can handle any plumbing questions called in by a consumer, builder, supplier, architect, engineer, inspector and the boss. However, at no time will I be "working with the tools" or performing jurisdictional plumbing work.

The duties of the position as explained by Mr. Ceren conform to the traditional definition of a managerial employee; i.e. one who formulates and effectuates management policies by expressing and making operative the decisions of their employer. *N.L.R.B. v. Bell Aerospace*, 416 U.S. 267, 289, 94 S.Ct. 1757 (1974). Thus, the ALJ's failure to adopt Mr. Ceren's concessions as to the veracity of the letters to the Union and, particularly, the September 10, 2013 letter is clear error. If not discarded, the admissions contained therein undeniably prove that Mr. Ceren was a managerial employee and not entitled to the protections of the Act.

iii. The ALJ also erred allowing Mr. Ceren to discredit his prior statements as lies.

In discrediting Mr. Ceren's testimony about the October 2013 allegations, the ALJ rejected such allegations because "Ceren gave contradictory statements regarding what Malak said to him during their telephone conversation on October 10..." (JD 7:28-30). The ALJ thus endorsed the proper standard for credibility whereby she refused to accept statements of Mr. Ceren on direct examination which were discredited as lies on cross examination. However, citing *Double D Construction Group*, 339 NLRB 303, 305 (2003) and *Daikichi Sushi*, 335 NLRB 622, 623 (2001), the ALJ rationalizes that even though Mr. Ceren is a liar, she can accept some of his testimony as credible. Neither *Double D*, nor *Daikichi Sushi* stands for such a proposition. Rather, both cases involved credibility determinations concerning past lies, not ongoing dishonesty.

As already referenced herein, Mr. Ceren repeatedly testified on cross examination as to the veracity of his dealings and letters with the Union as well as his allegations and statements to the Labor Board. (Tr. 239-240). These letters, charges and statements were replete with references to his management position in estimating with MM. The various statements, oral and written, are detailed as follows:

a. On August 10, 2013, Mr. Ceren sent a withdrawal request letter to James F. Coyne, the Union's Business Manager. In the letter, Mr. Ceren indicated that he had been "offered a position with a signatory (union) plumbing contractor in Northern Illinois, performing non-jurisdictional work (a management position in Estimating)." Mr. Ceren assured Mr. Coyne that, "Again, it [the position] will be in a management capacity." He went on to request an "effective date" that he could start with "his new employer, in a management (non-union) position." (GCX 10)(Tr. 189-192).

b. On September 9, 2013, Mr. Ceren sent another letter to Mr. Coyne. Therein, Mr. Ceren again referred to a "job offer as a manager/estimator." He again reiterated that he would be "performing non-jurisdictional work and is not covered under the CBA, estimating/management." (GCX 11)(Tr. 192-196).

c. On September 10, 2013, Mr. Ceren sent a letter to Hugh Arnold, the Union's attorney. Therein, he explained the duties of his potential "new management position" in great depth and again emphasized that he would not "work with the tools" or perform jurisdictional plumbing work. (GCX 13)(Tr. 199-207).

d. On October 2, 2013, eight days after he claimed to be fired, Mr. Ceren wrote to William Hite, the President of the United Association. Therein, he emphasized a desire to "accept a management position." He repeatedly referred to a "job offer" and the "position offered." He emphatically stated that "The offer for employment is for a *management* position." (GCX 15).

e. On November 21, 2013, Mr. Ceren signed Charge No. 13-CB-117659 against his own Union wherein he swore under oath, in relevant part, that "Since August of 2013, the above named labor organization has failed and refused to allow Jeffrey Ceren to obtain a Estimating/Management position at a company...." Mr. Ceren testified at the hearing that the statement contained on the Charge was true and accurate. (RX 1)(Tr. 176-178).

f. On November 25, 2013, Mr. Ceren provided a statement to the Labor Board. Therein, he swore under oath that the job discussed with MM was a "residential estimator/a manager," that he would need a union withdrawal for the "management job," that the union refused to allow him to work "as a management estimator" for MM and that he only wanted

to withdraw from the Union to "perform the management estimator job" at MM. (Tr. 216-217, 238-239).

The admissions contained in these letters, charges and statements along with Mr. Ceren's concessions as to their veracity on cross examination should have been credited by the ALJ. Further, given these admissions, the ALJ should never have found that Mr. Ceren's job was anything but managerial in nature.

B. Mr. Ceren's Admissions Incontrovertibly Evince That MM Never Sought His Withdrawal From The Union And Its Only Motivation Was Union Acceptance Of Mr. Ceren's Employment Terms.

To the extent the Act does apply to Mr. Ceren as an estimator, the ALJ improperly concluded that MM violated the Act in terminating Mr. Ceren's purported employment on September 24, 2013 to avoid paying him union wages. (JD 7:46-47). This conclusion is premised upon statements made by Mr. Ceren on direct examination that were discredited as lies on cross examination. Perhaps the biggest lie that the ALJ adopted concerned the terms of the alleged employment agreement between MM and Mr. Ceren which the ALJ characterized as a "yellow dog" contract requiring Mr. Ceren to withdraw from the Union. (JD 8-9:29-18).[2]

As referenced previously, the agreement between MM and Mr. Ceren never required Mr. Ceren to withdraw from the Union. This distinction is key. Mr. Ceren admitted that MM only sought Union *approval* and it was *his* idea to seek withdrawal. (Tr. 185, 220-1). Specifically, Mr. Ceren testified at the hearing as follows:

> Q. Your agreement with M & M Affordable Plumbing was that you would work as an estimator, in non-jurisdictional, non-bargaining unit work, correct?

[2] While the ALJ concludes as to the nature and illegality of the supposed "yellow dog" contract, such was never part of Mr. Ceren's charges or the General Counsel's Complaint.

A. Correct.

Q. And that you would be paid a salary, correct?

A. Correct.

Q. And that the union had to approve it, correct?

A. Correct. (Tr. 220-1).

Mr. Ceren's admission is further bolstered by the first piece of sworn evidence he provided in this saga, his initial charge against the Union. On November 22, 2013, Mr. Ceren filed a charge against the Union and alleged as follows:

> "Since August of 2013, the above named labor organization has failed and refused to allow Jeffrey Ceren to obtain a Estimating/Management position at a company (after referral from the Union Hiring Hall) because [sic] arbitrary or discriminatory reasons." (RX 1).

Mr. Ceren affirmed the veracity of his November 2013 charge under oath at hearing. His testimony was as follows:

Q. Okay. And everything contained on this document is true and accurate. Is that correct?

A. Correct. (Tr. 178).

Thus, Mr. Ceren's concessions along with his sworn charge to the Labor Board from as early as November 22, 2013, reveal that Union approval, not withdrawal, was required under his agreement with MM.

The ALJ's failure to credit Mr. Ceren's concessions as to the nature of his agreement with MM led to the erroneous conclusion that he was terminated for failing to withdraw from the Union. Indeed, Mr. Ceren's association with MM ended because he could not comply with a far different

term of the agreement, union approval. (Tr. 221). The ***only*** logical conclusion is that MM was motivated by its lawful employment offer, nothing else. To hold otherwise, would essentially criminalize good faith, lawful attempts to explore the retention of Union members in non-jurisdictional positions. Such is not the intent of the Act, and does not serve to protect any rights afforded by the Act. Further, to hold MM responsible for Mr. Ceren's singular decision to seek Union withdrawal would set a precarious precedent and provide a trap for employer's acting in good faith by recognizing an employee's right to withdraw ***or*** remain with a Union.

i. Mr. Ceren was never really employed by MM.

Nearly one year after MM and Mr. Ceren's association, the ALJ concluded that Mr. Ceren was employed by MM as an estimator. However, the facts of this case, including repeated admissions by Mr. Ceren, suggest differently. Indeed, it was not until his January 2014 charge that Mr. Ceren first claimed he was ***ever*** employed by MM. At all times prior, Mr. Ceren repeatedly claimed that he had not yet been hired by MM for the "position," as he referred to it, in letters penned by him on August 10, 2013, (GCX 10); September 9, 2013, (GCX 11); September 10, 2013, (GCX 13); and October 2, 2013, (GCX 15). Further, in the initial charge Mr. Ceren filed against the Union with the Labor Board, he clearly averred that he had never obtained the "Estimating/Management position." (RX1). Mr. Ceren confirmed these documents contained true and accurate statements throughout his cross-examination. (Tr. 173, 178).

While the ALJ discredits MM's stance that Mr. Ceren was an independent contractor pending union approval of his employment and criticizes the methods by which the two initially associated, one thing is certain – the association was not a classic employment relationship. Rather, it clearly possessed the indicia of an independent contractor relationship. See *Frito-Lay, Inc. v. N.L.R.B.*, 385

F.2d 180, 187 (7th Cir. 1967) citing *Pure Seal Diary Co.*, 135 N.L.R.B. 76 at 79 and *United Insurance Company of America v. N.L.R.B.*, 304 F.2d 86, 89-90 (7th Cir. 1962). This conflict between contractor and employee is aptly illustrated not only by Mr. Ceren's repeated letters, charges and statements, but also his testimony. For instance, when asked at hearing whether Mr. Malak ever called him an employee of MM, Mr. Ceren testified as follows: "I don't recall, sir." (Tr. 208). Mr. Ceren, a former plumbing company owner, also never sought, nor received a W-9 form. (Tr. 209). Further, Mr. Ceren never sought, nor was he paid wages. (Tr. 222).

Whether the ALJ's classification of Mr. Ceren's association with MM as employment nearly one year after the fact is a proper legal conclusion is immaterial to the real issue. Rather, it is indicative of yet another broken link in the ALJ's chain of logic. For, if MM actually did condition Mr. Ceren's employment on union withdrawal (which it did not), how was it that Mr. Ceren became employed prior to receipt of the September 24, 2013 denial letter? In truth, the conclusion and the fact are contradictory of one another and cannot stand together.

ii. MM was never required to pay Mr. Ceren union wages.

Underlying the ALJ's ruling is the finding that MM was motivated to avoid payment of union wages to Mr. Ceren. However, the ALJ never makes any finding, nor could she, that MM would have been required to pay any estimator or manager, let alone Mr. Ceren, union scale.[3]

As admitted by Mr. Ceren and Mr. Turnquist, and as referenced in the applicable collective-bargaining agreements of the Local 130 and the former Local 501 as well as the United Association By-Laws, estimating is not bargaining unit work. (Tr. 70-73)(GCX 3, 6, 9, & 27). Incidentally,

[3] Given this key point, the ALJ's rejection of MM's argument concerning Mr. Ceren's position being outside of the craft jurisdiction as immaterial is curious and improper. (JD 12:28-38).

neither is management. Mr. Ceren testified repeatedly that estimating was not jurisdictional work. (Tr. 192, 200, 205, 207 & 220).

Thus, yet another broken link exists in the ALJ's chain of logic for how could MM be motivated to avoid payment of wages that it had no obligation to pay in the first place?

iii. MM lacked any antiunion animus.

The final chink in the ALJ's chain of logic exists in her finding that MM displayed antiunion animus.[4] (JD 10-11:37-35). Digging deep, the ALJ concludes that the temporal proximity of Mr. Ceren's receipt of the September 24th denial letter and his supposed discharge as well as MM's "conflicting" defenses provide, in her view, ample evidence of antiunion animus. Of course, absent such a showing, no liability can exist. *Electri-Flex Co. v. N.L.R.B.*, 570 F.2d 1327, 1331 (7th Cir. 1978).

As to the temporal proximity of the denial letter and the end of Mr. Ceren's association with MM, the ALJ once again fails to account for the true nature of MM and Mr. Ceren's agreement. It was an agreement conditioned not upon Mr. Ceren's withdrawal from the Union, but, rather, the Union's approval of his acceptance of the position. While the denial letter specifically denies Mr. Ceren's request to withdraw, it also undeniably reveals the Union's position on estimators. In doing so, the Union states, in relevant part, as follows:

> "We have considered your request and have to say no, not because of any one particular part of the job description, but because much of the work you describe has been historically and traditionally done by good UA members who pensioned out doing many of these same duties in the twilight of their careers, while retaining their membership in the Local Union and enjoying a prosperous and well earned pension

[4] Despite the ALJ's view to the contrary, this case is properly viewed under the *Wright Line*, 251 NLR 1083 (1980) dual motive analysis given Mr. Ceren's admissions as to MM's motivation which directly contradicted the General Counsel's Complaint.

with your members behind them to continue working at 'The Honorable Toil....'" (GCX 14).

Thus, the Union makes clear that it would never approve a Union member working as an estimator for non-union scale. Once again, the distinction between MM and Mr. Ceren's condition of employment, i.e. Union approval, and Mr. Ceren's choice of Union withdrawal becomes key.

Indeed, Mr. Ceren himself acknowledged the distinction on cross examination when he testified as follows:

Q. Your employment in September, for you to take the position, the position that was offered that we've been talking about, was condition on the union's acceptance either of the position or of your withdrawal. Fair?

A. Fair.

Q. And you couldn't get that in September 2013; isn't that fair?

A. That's fair.

Q. And that why you are no longer with M & M Affordable Plumbing, isn't that fair?

A. That's fair, that Mike wouldn't, yes. (Tr. 221).

Thus, Mr. Ceren himself made it plainly clear that his employment with MM was not conditioned on withdrawal. Rather, Union approval is all that was needed. His testimony further and incontrovertibly reveals that his association with MM ended because he could not obtain Union acceptance. As repeatedly stated by MM in this case, how can seeking union approval for the retention of a member in a non-jurisdictional position be construed as antiunion animus. The simple answer is that it cannot. Thus, the temporal proximity of the withdrawal denial and the end of Mr. Ceren's association with MM does not suggest antiunion animus.

Next, the ALJ finds antiunion animus in what she views as "multiple and shifting justifications" for Mr. Ceren's termination. Respectfully, the ALJ's view is shocking given the multiple stories and lies told by Mr. Ceren, who even went so far as blaming the General Counsel for his perjury. (Tr. 226). Ultimately, the ALJ's view is once again colored by her failure to accept Mr. Ceren's admissions as well as her failure to observe controlling case law. In fact, MM's defenses have been consistent and complimentary of one another since day one and evidence existed by way of Mr. Ceren's actions, writings and testimony to support each defense.

The defenses asserted by MM stem from the facts of this case which show an employment offer conditioned on union approval and an association between MM and Mr. Ceren prior to the receipt of the September 24th denial letter. Overwhelming evidence and admissions exist to show that Mr. Ceren was offered a management position in estimating, that Mr. Ceren associated with MM as a contractor, that Mr. Ceren was never actually hired by MM and that the association ended because Mr. Ceren could not comply with the union approval condition to the employment offer. The ALJ's view of these positions as contradictory is not supported by the facts, and instead relies on erroneous legal conclusions and her wholesale acceptance of Mr. Ceren's discredited testimony.

In the end, the ALJ's justifications for her finding of antiunion animus do not hold water. Absent a showing of antiunion motivation, no liability can exist. *Electri-Flex Co. v. N.L.R.B.*, 570 F.2d at 1331.

Conclusion

For the reasons set forth above, MM respectfully request that the Board grant its exceptions and dismiss the Complaint in its entirety.

Respectfully Submitted,

M & M AFFORDABLE PLUMBING, INC.

By: /s/ Joshua M. Feagans
One of Its Attorneys

Joshua M. Feagans
Patrick M. Griffin
Griffin | Williams LLP
501 W. State Street, Suite 203
Geneva, IL 60134
(630) 524-2563

STATEMENT OF SERVICE

I, the undersigned attorney, hereby certify that I caused the foregoing **Respondent's Brief in Support of Exceptions to the Administrative Law Judge's Decision** to be electronically filed with the National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001, using the E-Filing Program and served the following parties in the manner indicated, in accordance with Section 102.114(i) of the Rules and Regulations, by electronic mail before 11:59 p.m. EST on December 17, 2014:

Melissa Olivero, Administrative Law Judge
National Labor Relations Board
Division of Judges
1099 14th Street, N.W. Room 5400 East
Washington, D.C. 20005-3419
Email: Melissa.Olivero@nlrb.gov

Brigid Garrity, Esq.
Counsel for General Counsel
National Labor Relations Board
209 South LaSalle Street, Suite 900
Chicago, Illinois 60604
Email: Brigid.Garrity@nlrb.gov

Mr. Thomas B. Porter
Compliance Officer
National Labor Relations Board
209 S. LaSalle Street, Suite 900
Chicago, Illinois 60604
Email: Thomas.Porter@nlrb.gov

Mr. Jeffrey Ceren
855 Bayway Boulevard, Unit 406
Clearwater Beach, FL 33767
Email: jaceren01@gmail.com

Mr. John Toomey
Arnold & Kadjan
19 West Jackson Boulevard, Suite 300
Chicago, Illinois 60604
Email: jtoomey100@hotmail.com

By: _____
Attorney for Respondent

Joshua M. Feagans, Esq.
GRIFFIN|WILLIAMS LLP
501 West State Street, Suite 203
Geneva, IL 60134
Phe: (630) 524-2563
Fax: (630) 262-0644